Supreme Court, U.S.
FILED
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No. 95-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

J. MICHAEL MURPHY,

PETITIONER,

v.

DIVERSIFIED PRODUCTS CORPORATION, INC.
AND STEPHEN J. O'BRIEN,

RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Eleventh Circuit's decision holding that the employment agreement was an ERISA plan, in controvention of this Court's and other appellant courts' decisions concerning similar plans, exceed the limits of appropriate judicial review.

II. Did the Eleventh Circuit exceed the limits of appropriate judicial review in preempting a state fraud claim, when that ruling leaves a plaintiff without a remedy at any level, despite the fact that many circuits have held differently.

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for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Mr. J. Michael Murphy hereby petitions for a writ of certiorari to enable this court to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Murphy v. Diversified Products Corp., Inc. and Stephen O'Brien*, NO. 94-6820 (11th Cir. 1995).

OPINIONS BELOW

The opinion of the court of appeals is unreported, and is produced as Appendix A (1a-2a). The opinion of the district court is unreported, and is produced as Appendix B (3a-23a).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit were issued on March 7, 1995. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §1132(a)(1) provides in pertinent part, "Persons empowered to bring a civil action. A civil action may be brought -- (1) by a participant or beneficiary --".

29 U.S.C. §1144(a) provides in pertinent part, "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan".

STATEMENT OF THE CASE

A. FACTS

Petitioner Murphy was an employee of Diversified Products, Inc. (DP), in various positions within the personnel or human resource department for approximately thirteen (13) years. He was initially hired as Director of Personnel by Diversified's former president, Cal James, on or about November 22, 1978. On March 3, 1980, he received an evaluation accompanied with a raise indicating that very good progress had been made. On March 2, 1981, he was evaluated and given a raise; the President of Diversified indicated he handled his job "masterfully". On December 1, 1982, he was given yet another raise, and a 1982 evaluation stated that Mr. Murphy's performance could be described as follows: " in one simple word - outstanding". On December 2, 1983, Mr. Murphy was promoted to

Vice-President - Personnel of Diversified and all the company's subsidiaries. Diversified was eventually sold (twice) and Mr. Cal James was replaced as Chief Executive Officer by Respondent O'Brien. This was announced on September 5, 1991. On December 13, 1991, Respondent gave Mr. Murphy a performance evaluation which indicated that the organization was relatively low on employee involvement/empowerment and requested proposals from Mr. Murphy. In his January 9, 1992 response, Petitioner Murphy requested weekly meetings and indicated his commitment to making "certain we are together in exactly what you want and expect from me and my folks."

Respondent then began meeting with Mr. Murphy approximately every two (2) weeks, and Mr. Murphy established an agenda for those meetings. On January 31, 1992, the Board of Directors voted to award contracts to its key employees that provided, among other things, a selling bonus or "golden parachute". [App. C, 29a-30a, Sec. 9d]. Pursuant to this board meeting, said employment agreements were prepared and presented to the president and its four (4) vice-presidents. When Mr. Murphy was presented with his agreement, he indicated he had some questions and requested that Respondent meet with him to discuss his questions; Respondent never set up this meeting. It is undisputed that Respondent opposed the awarding of these benefits, but the Board of Directors of DP awarded them over his objection. After the employment agreements were approved, Respondent continued to resist their implementation by negotiating a lower amount, not only with Mr. Murphy, but also with at least one (1) other vice-president, Tom Stith.

During late August of 1992, Mr. Murphy received his second performance evaluation from Respondent. It indicated that Mr. Murphy had obviously worked very hard to demonstrate his effectiveness as leader of the human resources

department. Curiously, the evaluation further stated the need to assess whether or not Mr. Murphy was the best person to lead the HR department or whether it would be best for Mr. Murphy to make a career move now or in the future. Respondent suggested that they review the situation at the end of this year.

On September 4, 1992, Mr. Murphy responded with a memorandum expressing his disappointment, asking that if "my professional relationship with you and DP is to be concluded, then I would expect both of us to also handle such with the highest degree of professionalism, mutual respect and integrity for you and DP as well as me and my family." Mr. Murphy and Respondent then began negotiating an agreement for Mr. Murphy's retirement. During a meeting where Mr. Murphy and Respondent were discussing terms of the retirement package, the two men also discussed the employment agreement. (Respondent denies this, although he made contemporaneous notes at this meeting indicating that the employment agreement was discussed).

Respondent O'Brien then placed an "X" through "Company Sale Bonus" on the employment agreement. Respondent stated unequivocally that there was no plan at that time for a sale of Diversified, and Mr. Murphy subsequently signed a Retirement Agreement, [App. D 34a-36a] relying on that misrepresentation. Mr. Murphy also relied on two (2) other misrepresentations by Respondent: that Westinghouse, the primary equity holder of DP at the time, would not honor the employment agreements, and that the agreements were invalid.

On March 9, 1993, Mr. Murphy spoke with J. Gary Shansby. Mr. Shansby had been Chairman of the Board for Diversified from March 1990 to January 1993. Mr. Murphy learned for the first time the Board of Directors had every intention of selling DP at the time of Respondent's mis-

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representation, and Respondent knew of these intentions. Mr. Murphy was also informed, for the first time, that Respondent was also untruthful concerning the employment agreements because they were valid and Westinghouse had every intention of honoring those agreements and further that they had been approved by the Board of Directors of Diversified Products.

On March 9, 1993, Fuqua Industries executed a letter of intent to purchase Diversified Products and the transaction closed in June, 1993.

B. PROCEDURAL HISTORY

Petitioner filed a Complaint in this action in the Circuit Court of Lee County, Alabama, on May 14, 1993. On June 15, 1993, Respondents removed the case to District Court on the basis that Petitioner's claims in this Complaint were pre-empted by ERISA. Respondents filed their Answer and Counterclaim (Counterclaim was by Diversified only) on June 21, 1993. In its Counterclaim, Diversified sought compensation for Petitioner's breach of a Retirement Agreement between the parties and a declaration that it had no further obligation to provide benefits to the Petitioner.

Petitioner filed a "Motion to Remand Removed Action", (hereinafter "Motion to Remand") on July 13, 1993. After hearing oral arguments, the court denied the Motion to Remand, on the grounds that Petitioner's state fraud claims were preempted by ERISA. Petitioner filed an Answer to the Counterclaim on September 8, 1993. On October 25, 1993, the Respondents filed a Motion for Summary Judgment which did not contain the signature of local counsel. On October 26, 1993, the Respondents revised the signature pages of the Brief in Support of Motion for Summary Judgment and Notice of Filing Original Deposition Transcript. On January 4, 1994, Petitioner filed an Interim Brief in Opposition Mo-

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tion for Summary Judgment and filed his complete brief on January 11, 1994. The Respondents filed a Motion to Continue Date Set for Pre-Trial Conference on January 18, 1994, which was granted in part and denied in part on January 19, 1994. The district court entered an Order and Judgment accompanied by memorandum opinion on August 3, 1994, granting Motion for Summary Judgment in favor of Respondents as to Petitioner's claims; denying said Motion as to Respondents' counterclaim; granting the Petitioner judgment against Respondents as to Respondents' counterclaim and dismissing this cause with prejudice with costs taxed against the Petitioner. On September 1, 1994, the Petitioner appealed to the 11th Circuit Court of Appeals, and on March 7, 1995, the Eleventh Circuit affirmed the district court's order. Petitioner filed an Application For Extension of Time to File Petition for Certiorari on June 5, 1995. This Court granted the application on June 23, 1995, and this petition follows.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT'S DECISION THAT THE EMPLOYMENT AGREEMENT IS AN EMPLOYEE BENEFIT PLAN COVERED BY ERISA CONFLICTS WITH THE LAW AS PROPOUNDED BY THIS COURT AND OTHER FEDERAL COURTS OF APPEAL

ERISA defines an employee benefit plan as "an employee welfare benefit plan or an employee pension benefit plan." 29 U.S.C. §1002(3). Benefits under these plans, including severance benefits, fall under ERISA's umbrella. *See Wallace v. Firestone Tire & Rubber Co.*, 882 F.2d 1327, 1329 (8th Cir. 1989). However, the mere existence of severance benefits, without a cor-

responding benefit plan[1] requiring the employer to maintain a benefit administration scheme does NOT implicate ERISA by the express holdings of this Court. *See Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987).

By holding that the "golden parachute" provision of the employment agreement is an ERISA plan, the Court of Appeals completely disregarded this Court's holding in *Fort Halifax*. *Id* at 8. *Fort Halifax* held that a Maine statute requiring employees to provide one time severance payments to employees, in the event of plant closings, was not an employee benefit plan, even though the statute related to an employee benefit. *Id.* "The requirement of a one-time, lump sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation." *Id* at 12.

The employment agreement in the case at bar, like the Maine statute, required a one-time, lump sum payment in the event DP was sold. "To do little more than write a check hardly constitutes the operation of a benefit plan." *Id*. The extent of DP's obligation to Mr. Murphy had he not been fraudulently induced into signing the retirement agreement, would have been to write a check.

Other circuits have correctly followed *Fort Halifax* in determining that certain employee benefits, like the "golden parachute" in this case, do not constitute a plan for ERISA purposes. *See Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254 (8th Cir. 1994). In *Kulinski*, the Eighth Circuit held that an agreement to pay

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[1] ERISA defines an "employee welfare benefit plan" as "any plan, fund, or program . . . . for the purposes of providing for its participants specified benefits." 29 U.S.C. § 1002(1).

the company's president and chief executive officer 2.99 times his annual compensation, in the event of his termination, was a "golden parachute" and not an employee benefit plan. *Id* at 258. The case at bar is practically identical in that DP agreed to pay its executive vice presidents 150% of their annual salary plus bonuses if the executives were terminated following a sale of the company.[2]

The *Kulinski* court, just as this court reasoned in *Fort Halifax*, based its determination that the "golden parachute" was not an employee benefit plan on the basis that no continuous administrative scheme was required to process the benefits. *Kulinski*, 21 F.3d at 238. Here, the employment agreement also required no ongoing administrative scheme; DP simply promised to write a check to the executives if their termination resulted from a company sale.

The Fifth Circuit, also relying on *Fort Halifax*, reached a similar result in *Fontenot v. N.L. Industries, Inc.*, 953 F.2d 960 (5th Cir. 1992). *Fontenot* held that a one-time lump sum payment to certain employees triggered by a single event, the change of control of NL Industries Inc., was not an employee benefit plan; thus it was not covered under ERISA. *Id* at 962-963.[3] Once again, the court's reasoning was based on this Court's holding as the plan in dispute required no administrative scheme; the employer simply had to make one payment and "assumed no responsibility to pay benefits on a regular basis . . ." *Id* at 926 (quoting *Fort*

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[2] *See* [App. C 29a-30a]

[3] *See also Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990), where the court held that a lump sum severance payment to employees was not an ERISA plan. Thus, employees fraudulent inducement claims were not preempted by ERISA.

Halifax). The circumstances of the case at bar, strikingly similar to the cases decided by this Court and other circuits, mandate a finding that the employment agreement is not an ERISA plan.

Other circuits have also ruled in accordance with *Fort Halifax*. *James v. Fleet/Norstar Financial Group*, 992 F.2d 463 (2nd Cir. 1993) (holding that agreement to pay 60-days additional pay following last day of work which could be taken either in lump sum or in biweekly installments was not an ERISA plan; negligent misrepresentation claim was not preempted); *Sherrod v. General Motors Corp.*, 33 F.3d 636 (6th Cir. 1994) (holding that a plan providing alternative work for employers who lost their jobs due to technological innovations and a plan where employees could elect lump sum payment if they ceased working were not ERISA plans).[4]

The Court of Appeals summary treatment, or mistreatment, of the employment agreement constituted a clear non-application of *Fort Halifax* and other circuit courts' opinions, which follow this precedent. The lower courts, as evidenced by their inconsistent holdings, are in need of clarification as to the current meaning and application of *Fort Halifax*.[5]

II. THE CONTINUING CONFLICT IN THE CIRCUITS REGARDING ERISA PREEMPTION OF STATE COM-

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[4] *But See Swinney v. General Motors Corp.*, 46 F.3d 512 (6th Cir. 1995), where a different panel of the same circuit seemed to ignore *Fort Halifax* and take a contrary position on the same GM plans.

[5] Contrary to the language in the Eleventh Circuit's 1 1/2 page opinion, petitioner never conceded that the employment agreement was an ERISA plan. [App. E 37a-39a]. Respondent also devoted over 20% of its argument to the Eleventh Circuit claiming the agreement was an ERISA plan. The retirement agreement is conceded to be an ERISA plan by petitioner.

MON-LAW CLAIMS REQUIRES THE INTERVENTION OF THIS COURT, PARTICULARLY WHEN PREEMPTION LEAVES A PLAINTIFF WITHOUT REMEDY UNDER EITHER FEDERAL OR STATE LAW.

Even if *Fort Halifax* could be overlooked, and the employment agreement did qualify as a benefit plan under ERISA, the Eleventh Circuit's conclusion on ERISA preemption[6] leaves Mr. Murphy without any remedy for the fraud perpetrated by respondent and misinterprets the Congressional intent of preemption. Mr. Murphy is not a "participant" under the employment agreement because he was fraudulently induced to elect the retirement agreement by respondent's misrepresentations. Therefore, Mr. Murphy cannot sustain an ERISA claim per 29 U.S.C. §1132(a)(1). The holding of the Eleventh Circuit stands for the proposition that employers may fraudulently induce employees to abandon an attractive benefit plan in favor of a less attractive plan and not be liable under ERISA (because the defrauded party is no longer a participant in the attractive plan) or state common law because that claim is preempted.

This interpretation of ERISA, a law enacted to protect employees[7] from employer misconduct, gives employers carte blanc power to defraud employees with impunity. Surely Congress did not intend the preemption provision as a sword for fraudulent and deceitful employers to escape liability for their misconduct. A number of circuits have rejected this narrow interpretation of ERISA preemption and allowed state common-law claims to go forward, especially when

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[6] 29 U.S.C. 1144(a) provides in part, that ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . "

[7] *See* 29 U.S.C. 1001(b).

the injured party is not a participant under the plan in question.

A. MR. MURPHY'S FRAUD CLAIM IS NOT SUBJECT TO ERISA PREEMPTION BECAUSE HE WAS NOT A PARTICIPANT IN THE EMPLOYMENT AGREEMENT.

When confronted with this issue, the Ninth Circuit held that state law claims of misrepresentation and breach of contract were not preempted by ERISA because the plaintiff was not a participant under the benefit plan. *Harris v. Provident Life and Acc. Ins. Co.*, 26 F.3d 930 (9th Cir. 1994). In *Harris*, a former employee brought suit claiming he was told that he had medical coverage for his dependents when, in fact, said coverage was not to begin until over a year later. *Id* at 932. In rejecting defendant's arguments that these state law claims were preempted by ERISA, the court held that "because the Harrises (sic) are not plan participants, beneficiaries, or fiduciaries, their remaining state claims are not preempted." *Id* at 934 (emphasis by the court). The court went on the point out that,

> "it would be contradictory to rule that state law claims are preempted where the court has already held that the same plaintiffs may not assert a claim under ERISA because they are not 'participants' in the ERISA plan." *Id* (quoting *Deller v. Portland Gen. Elec. Co.*, 734 F. Supp. 916, 918 (D. Or. 1990).

Mr. Murphy was a non-participant in the employment agreement due to respondent's fraudulent inducement. It would be unseemly to preempt Mr. Murphy's valid fraud claim and reward

respondent's deplorable conduct, leaving Mr. Murphy with no remedy at all. "Unlike the chesire cat, one cannot have the smile of preemption without the stripes of participation." *Baird v. CSX Corp.*, 704 F. Supp. 100, 103 (W.D. Va. 1989). Since Mr. Murphy is not a participant, respondent should not be allowed to completely escape liability through the preemption provision of ERISA.

The Sixth Circuit held similarly when it decided that plaintiff's claims of bad faith concerning medical expenses is the subject of Ohio law because the plaintiff was not a participant or beneficiary of the ERISA plan. *Fugarino v. Hartford Life and Acc. Ins. Co.*, 969 F.2d 178, 186 (6th Cir. 1992), *cert. denied*, ____ U.S. _____, 113 S. Ct. 1401 (1993). The court reasoned, "if the plaintiff is not a 'participant' or 'beneficiary' he may sue under and seek the broader relief provided by state tort law." *Id* (quoting *Dodd v. John Hancock Mut. Life Ins. Co.*, 688 F. Supp. 564, 568 (E.D. Cal. 1988). In *Furgarino*, the plaintiff was not a participant because he was the employer's dependant, while Mr. Murphy is not a participant in this case because respondent fraudulently induced him to retire and accept the inferior retirement agreement.

However, the principle of preemption is the same; plaintiffs may not be left without a state or federal remedy simply because their employer fraudulently prevented them from becoming a participant in a benefit plan. A rule of this nature, unfortunately and erroneously endorsed by the Eleventh Circuit, is the antithesis of ERISA's intent and an affront to justice.

The Fifth Circuit allowed the state claims of an independent contractor (including a fraud claim) to escape preemption because said claims by a nonparticipant to a plan do not affect traditional ERISA entities, thus; these claims are

not preempted. *Weaver v. Employers Underwriters, Inc.*, 13 F.3d 172 (5th Cir.), *cert. denied*, ____ U.S. ____, 114 S. Ct. 2137 (1994). In *Weaver*, plaintiff's medical payments were stopped after the insurance carrier realized that plaintiff was not an employee and, thus, not a participant under the employee medical plan. *Id* at 174. In rejecting defendant's arguments that plaintiff's state law claims were preempted, the court ruled that the district court should have remanded all of the claims to state court without dismissing them because ERISA will not preempt a nonparticipant's state law claim.

Mr. Murphy has never sought relief under ERISA for respondent's fraudulent conduct. Respondent's argument that Mr. Murphy may not sustain an ERISA claim[8] is exactly the point. It is only respondent's fraud that kept Mr. Murphy from being a participant under the employment agreement. Since Mr. Murphy is not a participant under said plan, and cannot sustain an ERISA claim, he seeks the only appropriate remedy for a nonparticipant injured by the fraudulent inducement of an employer, compensation under the tort laws of his state. The Eleventh Circuit's opinion left Mr. Murphy, an innocent defrauded victim, with no way of obtaining compensation from the culpable party. This Court must now, in accordance with the correct rulings of other circuits, resolve this conflict and assure the courts that ERISA will not be made a tool for the deceitful to escape liability.

B. THE ELEVENTH CIRCUIT DID NOT FOLLOW THIS COURT'S GUIDANCE IN PREEMPTING MR. MURPHY'S STATE LAW CLAIMS

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[8] See Respondent's brief to the Eleventh Circuit.

In order to determine if a state claim is to be preempted by federal law, a court must look to congressional intent. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). Determining Congressional intent includes looking at both the explicit statutory language and the structure and purpose of the statue. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). The Eleventh Circuit's decision to preempt Mr. Murphy's state fraud claim, leaving him no remedy to fall back on (as he lacks standing to bring an ERISA claim), was in derogation to this Court's direction on the preemption issue.

In *McClendon*, this Court preempted a Texas wrongful discharge claim brought by a participant in his company's pension plan. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. at 135. The plaintiff sought recovery because the company allegedly terminated him to prevent vesting of pension benefits under the plan. *Id.* Congress obviously intended to prevent this type of claim under 29 U.S.C. §1144(a) because allowing these types of state claims would subject plans and plan sponsors to the burdens of different substantive law concerning participants in employee benefit plans. This which is precisely what Congress tried to foreclose under 29 U.S.C. §1144(a). *Id* at 142. The preemption section was intended to ensure that everyone involved in the ERISA plan would be subject to a uniform body of law. *Id.* In other words, allowing participants in ERISA plans to choose state claims over the federal claim would undercut the uniformity of employee benefit law that ERISA sought to achieve.

In this case, however; that policy of preemption does not apply because Mr. Murphy, as both sides agree and has been discussed, was not a participant in the employment agreement. In *McClendon*, Justice O'Connor pointed out that the

plaintiff chose not to assert any cause of action under ERISA. *Id* at 136. Mr. Murphy did not have the luxury of that choice and instigated the fraud claim as his only redress. This Court has never held that the Congressional intent of ERISA §514(a) is to preempt state law when it leaves a nonparticipant without any remedy whatsoever. This Court has only enforced the preemption provision to prevent participants of ERISA plans from electing state law over federal law and defeating the uniformity of ERISA; no such policy would be served by preempting Mr. Murphy's fraud claims in this case.[9]

In summary, the pursuit of justice can only be hampered by the ruling of the Eleventh Circuit. It establishes a precedent that encourages employers to trick employees out of being participants in employee benefit plans and allows them to perpetrate fraud that would be actionable, but for the fact that the fraud occurred in the context of a benefit plan, leaving the defrauded party without a remedy. Given the fact that other circuits have interpreted 29 U.S.C. 1144(a) and this Court's holdings more leniently,[10] and correctly, it is incumbent on this Court to resolve this important federal issue and make it clear that culpable employers may not have it both ways.

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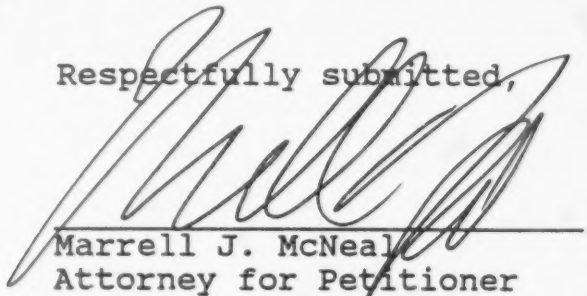
[9] *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (Holding that state tort and contract claims brought by a beneficiary of an employee benefit plan was preempted because plaintiff could have asserted ERISA claims).

[10] *See Perry v. P*I*E Nationwide Inc.*, 872 F.2d 157 (6th Cir. 1989), *cert. denied*, 493 U.S. 1093 (1991) (Fraud in the inducement not preempted, even though plaintiffs were beneficiaries under the plan because it wasn't existence at the time of the fraud).

CONCLUSION

For the foregoing reasons, this Court should grant this petition for writ of certiorari;.

Respectfully submitted,



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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Filed in the U.S. Court of Appeals Eleventh Circuit March 7, 1995.

No. 94-6820
Non-Argument Calendar

D.C. Docket No. CV93-V-738-E

J. MICHAEL MURPHY,

Plaintiff-Counter-Defendant-Appellant,

versus

DIVERSIFIED PRODUCTS CORPORATION;
STEVE O'BRIEN, individually;

Defendants-Counter-Claimants-Appellees,

FICTITIOUS DEFENDANT(S),
X, Y AND Z,

Defendants

Appeal from the United States District Court
for the Middle District of Alabama

(March 7, 1995)

Before TJOFLAT, Chief Judge, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

In this ERISA case, the district court denied relief to a retired officer of the appellee corporation. We affirm.

As the district court concluded, and the appellant properly concedes, the Employment Agreement and Retirement Agreement at issue herein are covered by ERISA. The question is whether appellant's claim of fraud is barred because it "relates to" either or both of these agreements, and, if so, whether appellant has made out a claim (i.e., other than for fraud) under the statute.

Appellant's claim relates to the Employment Agreement because, to recover, he must establish that (1) the Employment Agreement is a valid obligation of the appellee corporation, (2) O'Brien misled him about whether Westinghouse would pay the severance benefits provided under that agreement, (3) appellant, to his detriment, justifiably relied on O'Brien's alleged misrepresentations, and (4) appellant was damaged when he did not receive the additional severance benefits that he allegedly would have received had he still been employed by the appellee corporation in June 1993. Appellant's claim also "relates to" the Retirement Agreement because appellant seeks an order setting that agreement aside and declaring it void. In sum, appellant's fraud claim is barred.

Appellant has no claim under ERISA. First, he is not a "participant" under the Employment Agreement because he never signed it. Second, he has received precisely those benefits to which he is entitled under the Retirement Agreement. Third, ERISA does not provide the relief appellant seeks, to-wit: compensatory and punitive damages.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

J. MICHAEL MURPHY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO.
	)	93V-738-E
DIVERSIFIED PRODUCTS	)	
CORPORATION;	)	
ET AL,	)	
	)	
Defendants.	)	

ORDER AND JUDGMENT

In accordance with the Opinion entered in the above-styled cause on this date, it is ORDERED, ADJUDGED and DECREED by this Court:

1. That Defendants' Motion for Summary Judgment filed herein October 25, 1993, be, and the same is hereby, GRANTED in favor of Defendants as to Plaintiff's claims and that said motion is hereby DENIED as to Defendants' counterclaim.

2. That Plaintiff have judgment against the Defendants as to Defendants' counterclaim.

3. That the above-styled cause is hereby DISMISSED with prejudice with costs taxed against Plaintiff, for which execution may issue.

DONE this 3rd day of August, 1994.

/s/ R.E. Varner
R. E. Varner
UNITED STATES DISTRICT JUDGE

Filed August 3, 1994.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

J. MICHAEL MURPHY,	)	
	)	Filed August 3,
	)	1994.
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO.
	)	93V-738-E
	)	
DIVERSIFIED PRODUCTS CORPORATION;	)	
ET AL,	)	
	)	
Defendants.	)	

O P I N I O N

This cause is before the Court on Motion for Summary Judgment, together with supporting brief and materials, filed herein October 25, 1993, by Defendants Diversified Products Corporation ("D.P.") and Stephen O'Brien; on supplemental letter brief filed herein November 5, 1994, by Defendants; and on "Objection to Motion for Summary Judgment", together with supporting brief and materials, filed herein January 11, 1994, by Plaintiff, J. Michael Murphy.[1] This

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[1] Plaintiff failed to file a response to Defendant's motion for summary judgment on November 10, 1993 as directed by the Court's Order of October 27, 1993. However, on January 11, 1994, this Court granted Plaintiff's motion for leave to file a response to Defendant's motion. On January 18, 1994 Defendants moved for a continuance of the pretrial conference, which was scheduled for February 1, 1994. By Order dated January 19, 1994, this court granted Defendants' motion for continuance and rescheduled the pretrial conference for September 22, 1994, and further continued the trial date until November 7, 1994.

Court has jurisdiction pursuant to 28 U.S.C. §1331.

I. BACKGROUND

Plaintiff was formerly employed by Defendant D.P. in various positions within the personnel or human resource department for approximately thirteen years. In January 1992, the Board of Directors authorized D.P. to enter into employment agreements with Steve O'Brien, President and CEO of D.P., and four vice-presidents of D.P., including Plaintiff who was Vice President of Human Resources at that time. In February, 1992, O'Brien offered Plaintiff and the other vice presidents the opportunity to enter into employment agreements. The employment agreements provided that these individuals would receive certain compensation in the event of termination, [¶ 9(c) of Employment Agreement, Exhibit A to Plaintiff's Complaint], and also contained a "golden parachute" provision which agreed to pay these individuals 150% of their salary plus certain bonuses in the event the individuals lost their employment after a sale or merger of the company. [¶ 9(d) of Employment Agreement].

In August 1992, Defendant O'Brien suggested to Plaintiff that he consider a career move "now or in the near future." Thereafter, Plaintiff began negotiating with Defendant O'Brien over the terms of his separation from D.P. Defendant O'Brien allegedly told Plaintiff that no sale of D.P. was in progress or contemplated and that, in any event, Westinghouse Credit Corporation, the primary equity owner of D.P., would probably not honor the employment agreement with Plaintiff and thus it was not valid. Plaintiff then negotiated and agreed to accept retirement under an agreement that called for, among other things, paying Plaintiff's salary for 12 months after retirement and allowing Plaintiff to retain group health insurance coverage and maintain life insurance coverage at his current rate

for one year after retirement. The retirement agreement also contained a provision precluding Plaintiff from making any claims against Defendant D.P., its management, or stockholders. [Retirement Agreement, Exhibit B to Plaintiff's Complaint]. After Plaintiff retired and began receiving his retirement benefits from D.P., Plaintiff learned that the employment agreement had in fact been valid and that Defendant O'Brien had been allegedly active in seeking a purchaser of D.P. at the time Plaintiff entered into the retirement agreement.

Plaintiff then filed a four-count Complaint on May 14, 1993 in the Circuit Court of Lee County, Alabama alleging various forms of fraud against Defendants D.P. and O'Brien. The basis of Plaintiff's action is that the Defendants misrepresented to him that the employment agreements were not valid, that Westinghouse would not allow D.P. to perform the contracts and that no sale of D.P. was contemplated. Plaintiff further alleges that he relied on these misrepresentations to his detriment by retiring from his employment with D.P.

Defendants removed the action to this Court on June 15, 1993 arguing that the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1002(3) and 1003(a)(1), preempted Plaintiff's state law claims and asserting jurisdiction pursuant to 28 U.S.C. §1331. Plaintiff filed a Motion to Remand on July 13, 1993 which was subsequently denied by this Court by Order dated August 6, 1993. Defendants now move for summary judgment on Plaintiff's claims and on their counterclaim.

II. STANDARD FOR SUMMARY JUDGMENT

In considering a motion for summary judgment, this Court must refrain from deciding material factual issues but, rather, must decide

whether such factual issues exist and, if not, whether the party moving for summary judgment is entitled to judgment as a matter of law. **See** Domininck v. Dixie National Life Ins. Co., 809 F.2d 1559 (11th Cir. 1987). Furthermore, all inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. **See** Tippens v. Celotex Corp., 805 F.2d 949 (11th Cir. 1986). "Rule 56(c) mandates the entry of summary judgment *** against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); **accord** Kramer v. Unitas, 831 F.2d 994, 997 (11th Cir. 1987), "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no **genuine** issue of **material fact**" [emphasis in original]. Anderson v. Liberty Lobby, 477 U.S. 242, 247-48 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a [reasonable] jury to return a verdict for that party ***. If the evidence is merely colorable *** or is not significantly probative, summary judgement may be granted." Anderson., **supra**, 477 U.S. at 249-50; **accord** Brown v. City of Clewiston, 848 F.2d 1534, 1537 (11th Cir. 1988).

III. DEFENDANT'S MOTION AS TO PLAINTIFF'S CLAIMS

Defendants move this Court to grant summary judgment in their favor on the basis that Plaintiff's state law claims for fraud are preempted by ERISA. As pointed out by Defendants, this Court held in its Order of August 6, 1993 that Plaintiff's fraud claims relate to an ERISA-governed employee benefit plan and therefore are preempted. Plaintiff, however, argues that preemption should apply to a state law claim only

if Congress has provided a remedy for the wrong asserted. In this case Plaintiff contends that state law provides a remedy for fraud, that he can establish every element of a fraud claim, and that he should be allowed to present his claim to a jury.

The Eleventh Circuit Court of Appeals in Sanson v. General Motors, Corp., 966 F.2d 618 (11th Cir. 1992), addressed a similar situation whereby it decided the question of whether ERISA preempts a state law fraudulent misrepresentation claim based on a reasonable reliance that causes a person a loss of benefits which would have been received under a special early retirement program. In Sanson, the plaintiff, Chester Sanson, alleged that General Motors Corporation ("GM") fraudulently represented to him that benefits under a special retirement program would not be offered to Lakewood assembly plant employees, including the plaintiff. Sanson further alleged that he relied upon that representation and voluntarily retired under the standard provisions of GM's early retirement program. Shortly after Sanson's retirement, GM offered the special program to certain eligible employees. Sanson immediately contacted GM and demanded that his retirement benefits be increased to the level that the special program provided. GM denied his request and Sanson brought suit seeking to recover the enhanced retirement benefits and compensatory and punitive damages. GM moved for summary judgment asserting that ERISA preempted Sanson's state law fraud claim.

After considering the Supreme Court's decision in Ingersall Rand Co. v. McClendon, 498 U.S. 133 (1990), the district court held that "a faithful application of the reasoning of McClendon to the facts of this case requires a finding that Plaintiff's cause of action under Georgia law is preempted under ERISA." Sanson, 966 F.2d at 620. The district court also denied

Sanson's request to amend his Complaint as "futile" based on its finding that Sanson did not satisfy the definition of "participant" or "beneficiary" under ERISA. Id.

On appeal Sanson argued that McClendon addresses whether ERISA preempts a claim under a pension-based state law, but that this case involved whether ERISA preempts a general fraud claim under a nonpension-based state law. In addressing the question of whether the state law "relates to" an employee benefit plan, the Eleventh Circuit found as follows:

> In this case, the misrepresentation relates to Sanson's retirement benefits available under GM's special retirement plan. The measure of damages would be the amount of benefits Sanson would have received under the retirement plan. Such a determination of damages demonstrates the relationship between the lawsuit and the special retirement plan.
>
> * * * Although the fraud statute does not involve the existence of a pension plan, the statute would not apply to this case without the existence of the retirement plan.
>
> The district court correctly held that McClendon mandates preemption of the plaintiff's state law claim.

Sanson, 966 F.2d at 620-21 (citations omitted).

Alternatively, Sanson contended that if ERISA preempted his state law claim, the district court abused its discretion in refusing him leave to amend his complaint to state a claim under ERISA. In addressing this contention, the Eleventh Circuit stated that '[t]he essential problem Sanson faces is that he does not satisfy the definition of 'participant' or 'beneficiary' under § 1132 of ERISA. 29 U.S.C. §§ 1002(7)-(8). Only a participant or beneficiary can file a civil action under ERISA." Sanson, 966 F.2d at 621. Thus, the court found that the district court did not abuse its discretion in refusing Sanson leave to amend his complaint.

While acknowledging his inability to express a statutory claim under ERISA, Sanson contended that there must be some avenue whereby an individual who is defrauded out of pension benefits can obtain a remedy. Sanson further argued that the court should create a federal common law fraud claim under ERISA, and suggested state law as the reasonable source for federal common law with recovery limited in accordance with policies dictated by ERISA. However, the Eleventh Circuit pointed out that the Supreme Court has previously considered and rejected such an extension of the remedies guaranteed under ERISA:

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries

> were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted *** provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot [or decided not] to incorporate expressly." (Emphasis in original).

Sanson, 966 F.2d at 622 [quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (quoting Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985)) (cited with approval in McClendon, 498 U.S. at 144)].[2]

Furthermore, the Eleventh Circuit in Sanson followed a number of courts that adhere to the restrictive interpretation of § 502(a) as set forth in Pilot Life. Those courts hold that ERISA preempts state law claims of fraud and misrepresentation without regard to whether ERISA provides any remedy for the claimed wrong. **See** First Nat'l Life Ins. v. Sunshine Jr. Food Stores, 960 F.2d 1546, 1550 (11th Cir. 1992) (argument that ERISA provides inadequate remedy is insufficient reason to overcome language of statute); Lee v. E.I. DuPont de Nemours & Co., 894 F.2d 755, 757 (5th Cir. 1990) (ERISA preempts state law claims of fraud and misrepresentation without regard to whether ERISA provided any remedy for claimed wrong); Lister v. Stark, 890 F.2d 941, 946 (7th Cir. 1989), cert. denied, 111 S. Ct. 579 (1990) ("[w]hile our holding will

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[2] "'[T]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.'" Russell, 473 U.S. at 147 [quoting Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 97 (1981)].

leave [plaintiff] without a remedy, the availability of a federal remedy is not a prerequisite for federal preemption"); Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir. 1989) (preempting plaintiff's state law claims despite recognition that employer's misrepresentation was a "betrayal without a remedy").

> Plaintiff asserts that Sanson is distinguishable from the present case in that Sanson fell squarely within the purview of the class Congress was attempting to protect with the passage of ERISA. In Sanson, this was a funded pension plan available to arguably thousands of workers. In this instance, the alleged plan created by either the Employment Agreement or the Retirement Agreement is a one (1) person, unfunded payment schedule to be paid out of company revenue. There are no other participants to protect. This construction of ERISA causes it to work to the detriment of the very individuals it was established to assist and protect.

[Plaintiff's Brief at 9]. This Court agrees that construing the preemption provision of ERISA in such a broad manner causes the statute to work to the detriment of some individuals in cases like the instant one. However, Sanson is controlling authority in this circuit. Furthermore, Congress was well aware that the powerful preemptive force of ERISA displaced all state law claims "even when the state action purported to authorize a remedy unavailable under the federal provision." Pilot Life, 481 U.S. at 55. Congress' "deliberately expansive language" was "designed to establish pension plan regulation as exclusively a federal concern." Id. at 46 [quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)]. Based on the foregoing, it is the opinion of this Court that

Plaintiff's claims for fraud, including his claims for punitive damages,[3] are preempted.[4] Therefore, Plaintiff's only possible avenue for relief in this action is under the ERISA civil enforcement scheme.

The civil enforcement provision of ERISA provides that private civil actions may be brought only by a participant or beneficiary of the plan. **See** 29 U.S.C. § 1132. ERISA defines "participant" as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. " 29 U.S.C. § 1002 (2)(B)(7).[5] Moreover, the United States Supreme Court in Firestone Tire & Rubber Co. v. Branch, 489 U.S. 101 (1989), has stated that the "the term 'participant' is naturally read to mean either, 'employees in or reasonably expected to be in currently covered employment,' *** or former employees who 'have *** a reasonable expectation of returning to covered em-

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[3] "[T]he various types of relief available to plaintiffs in civil actions brought pursuant to ERISA's civil enforcement scheme do not include extra-contractual or punitive damages." Amos v. Blue Cross-Blue Shield of Alabama, 868 F.2d 430, 432 (11th Cir. 1989) [citing Russell, 473 U.S. at 148].

[4] Defendant also makes the argument Plaintiff's fraud claims are barred by the terms of the retirement agreement. However, because Plaintiff's fraud claims are preempted by ERISA, it is unnecessary for the Court to address that argument.

[5] ERISA further defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(2)(B)(8).

ployment' or who have a 'colorable claim' to vested benefits." Id. at 117-18.

Defendants contend that Plaintiff has failed to state a claim for relief under ERISA because he is not a "participant" in the severance plan established under the Employment Agreement. Defendants base this contention on the fact the Plaintiff never signed the Employment Agreement. [**See** Murphy Deposition, at 91-93, 242-43]. In response, Plaintiff asserts that it is undisputed that the Employment Agreement was extended to Plaintiff, that Plaintiff continued to work for D.P. after receiving his copy of the agreement, and that copies of the meeting of the D.P. Board of Directors shows that the agreements were binding. [Plaintiff's Brief at 10-11]. Plaintiff asserts that he accepted the Employment Agreement by performing it. [Id.] Plaintiff also contends that he was not terminated from his employment and that Defendants' argument that he would have been terminated had he not retired is speculative. [Plaintiff's Brief at 10].

It is the opinion of the Court that the facts in this case show that Plaintiff was not a participant in the benefits under the Employment Agreement, and that Plaintiff would have been terminated had he not retired. In late August 1992, Defendant O'Brien sent Plaintiff a performance evaluation which concluded with the following:

> "Mike, what we both need to access, is whether or not you are the best person to lead the H.R. function or whether it's best for you to make a career move now or in the near future. We should together review where we stand around the end of this year."

[Plaintiff's Exhibit 10]. Plaintiff responded to O'Brien's performance evaluation by letter dated September 4, 1992:

> "If my professional relationship with you and D.P. is to be concluded, then I expect both of us to also handle such with he highest degree of professionalism, mutual respect and integrity for you and D.P., as well as me and my family."

[**See** Plaintiff's Exhibit 11]. At some point in September 1992, O'Brien told Plaintiff that he had decided to terminate his employment with D.P. and asked Plaintiff to give him recommendations as to how to handle the separation. [Murphy Deposition at 113, 276; O'Brien Supplemental Affidavit at ¶ 3; O'Brien Deposition at 131-32, 138]. Plaintiff further testified in deposition that he again met with O'Brien "to talk with him and to try to get the best deal I could for hopefully my retirement." [Murphy Deposition at 276]. At that meeting, Plaintiff relied on a copy of the Employment Agreement and a proposal for certain benefits which he wanted. [Murphy Deposition at 113]. In fact, the Employment Agreement "formed the framework of our discussions about separation." [Murphy Depositions at 263, 269].

Plaintiff claims that during these negotiations O'Brien told him that Westinghouse probably would not honor the Employment Agreements. [Murphy Deposition at 260, 345, 358-59]. Plaintiff also claims that O'Brien told him that there were no plans to sell D.P. at that time. [Id. at 260, 262, 345, 358]. Based on O'Brien's allegedly telling him that "in all probability [the contract was not] going to be valid and honored or accepted by Westinghouse and its stock options are nonexistent, " Plaintiff thought "that ought to be worth something" and

"want[ed] to negotiate other factors because of that." [Id. at 261].

Based on the foregoing, it is the opinion of the Court that plaintiff negotiated the terms that he wanted, which included his ability to retire rather than be terminated. Plaintiff's efforts were formalized into the Retirement Agreement. Plaintiff had several months from the time he was first presented with the Employment Agreement until the time he negotiated his separation in which to pursue the terms of the Employment Agreement further. However, plaintiff chose to retire and used the terms of the Employment Agreement as a framework from which to build the terms of his retirement. It is further the opinion of this Court that Plaintiff was not a participant under the Employment Agreement because of his failure to contract for that right, and therefore has no colorable claim to benefits under that agreement.[6] Accordingly, summary judgment is due to be granted in favor of the Defendants.

IV. DEFENDANT'S MOTION AS TO THE COUNTERCLAIM

Defendants also move this Court to grant summary judgment in their favor on the counterclaim asserted against Plaintiff for bringing

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[6] The only matter which Plaintiff argues that he was defrauded out of is the "golden parachute," i.e., company sale bonus. Even assuming that Plaintiff had signed the Employment Agreement, he would not have been eligible for the company sale bonus because he was not terminated following the sale of the company. In fact, he was terminated several months before the sale of D.P. took place. Furthermore, there is no showing that under the D.P. general retirement plan, under Plaintiff's negotiated Retirement Agreement, or under the Employment Agreement that Plaintiff was eligible for the company sale bonus for a period of time, i.e., for the remaining term of the employment agreement, after he was terminated.

this suit in contravention of the Retirement Agreement. Defendants assert that Plaintiff should forfeit his rights to future benefits under the Retirement Agreement pursuant to 29 U.S.C. § 1132, which provides that a plan fiduciary may bring a civil action (1) to enjoin any act or practice which violates any provision of ERISA or the terms of the plan, or (2) to obtain other appropriate equitable relief to redress such violations or to enforce any of the provisions of ERISA or their terms of the plan. 29 U.S.C. § 1132(a)(3). D.P. contends that as the plan sponsor,[7] and thus a fiduciary under ERISA, it may bring the claims set forth in the counterclaim to obtain appropriate equitable relief - i.e., a forfeiture of future benefits - to redress Plaintiff's violation of the Retirement Agreement.

In general, ERISA staunchly protects employees by providing that non-forfeiture rules apply to all covered employer pension plans. The ERISA scheme provides only in a few specifically enumerated instances that a pension plan is exempt from nonforfeiture rules:

> This part [i.e., involving non-forfeiture] shall apply to any employee benefit plan *** other than -
>
> (1) an employee welfare benefit plan; [or]
>
> (2) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of

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[7] Under ERISA "plan sponsor" means "the employer in the case of an employee benefit plan established or maintained by a single employer ***." 29 U.S.C. § 1002(16)(B)(i).

> management or highly compensated employees;[8]* * *

29 U.S.C. § 1081(1) & (2). Yet, the statute is silent as to what must be proven, if anything, before a court may conclude that exempt pension plan benefits should be forfeited.

Defendants cite to a recent decision of the United States District Court for the Southern District of New Your, Carson v. Local 1588, 769 F. Supp. 141 (S.D.N.Y. 1991), to support the position that Plaintiff's benefits provided by the Retirement Agreement are forfeitable. Plaintiff Donald Carson, the elected secretary-treasurer and only full-time officer employed by Local 1588, was indicted and convicted on a variety of criminal charges. Thereafter, because Carson was disqualified by federal law from holding any position as an officer or employee or any labor union, he resigned his position at Local 1588. Carson subsequently made application for pension benefits under the union's 1979 Constitution and By-laws. Local 1588 granted Carson's application but later ceased payments after it determined that the payments were not proper. Carson filed suit. Id. 142-43.

Upon Carson's motion for summary judgment, the district court determined that the union's constitution and by-laws created a "top-hat" pension plan under 29 U.S.C. § 1081 (a)(3). Carson, 769 F. Supp. at 144. In examining whether benefits under the top-hat pension plan should be forfeited, the court found that most of the case law on the relevant portions of ERISA involve situations where the pension plan is a separate legal entity to which the nonforfeiture and non-alienation provisions apply. The court further found that two lines of cases

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[8] This type of pension plan is known as a "top-hat" plan.

exist: (1) "The first line of cases involve situations where an employee commits fraud against the employer," and (2) "[t]he second set of cases *** involve facts where a pensioner had defrauded or breached a fiduciary duty to a pension plan itself." Id. at 46.

The district court then looked to a recent case in which the Supreme Court considered whether a rank and file employee who defrauds or is convicted of criminal conduct against his union may be denied his benefits as a result of his conduct. The Court held that in the case of a pension plan, funded by the union but incorporated as a separate legal entity, which is subject to the non-feiture and non-alienation provisions of ERISA, it would be "[in] appropriate to approve any generalized equitable exception - either for employee malfeasance or for criminal conduct - to ERISA' prohibition on the assignment or alienation of pension benefits." Guidry v. Sheet Metal Workers Nat. Pension Fund, 493 U.S. 365, 110 S. Ct. 680, 687, 107 L.Ed.2d 782 (1990). In reaching this conclusion, however, the Court left open the possibility of allowing equitable relief in a case where the pensioner defrauded the pension plan itself. Id.

Based on its examination of the two lines of cases, the district court in Carson held:

> Neither these cases nor Guidry are entirely dispositive on the issues raised in this action. No prior case addresses the question of forfeiture of a top-hat pension plan, which plans are by definition not separately funded. Nonetheless, this Court concludes that this action is more closer analytically to the cases involving fraud to the pension plan itself. Since the top-hat pension plan is not a funded entity separate from the union treasury, the fund of

> the union and the fund of the pension plan are one and the same. Any breach of fiduciary duty committed by Carson that causes a significant loss to Local 1588 impacts on the financial ability of the pension plan to provide retirement benefits to future officers.

Carson, 769 F. Supp. at 146 (citations omitted). The district court then denied Local 1588's motion for summary judgment based on its finding that material issues remained as to whether Carson had a fiduciary duty to the plan, and if so, whether he breached that duty. Id.

The present case, while similar to Carson with regards to the fact that both involve an unfunded pension plan, is otherwise distinguishable. Defendants do not contend that the present case involves fraud, criminal conduct against the plan, or a breach of fiduciary duty on the part of Plaintiff, but merely assert that Plaintiff should forfeit his right to future benefits (or be estopped from claiming benefits in the future) because he breached the terms of the Retirement Agreement by bringing this suit.

Defendants seek forfeiture under ERISA"s civil enforcement provision which provides that a fiduciary may bring a civil action "to obtain other appropriate equitable relief." After researching the matter, the Court has found no Eleventh Circuit cases, or any other cases for that matter, which deal with the issue of whether pension plan benefits should be or should not be forfeited where the pensioner breaches the plan by making further claims against the company and its management, and where the only evidenced financial loss to the plan is in terms of benefits already paid, costs and attorneys' fees. However, it is the opinion of this Court that not every loss suffered by a

plan, especially in terms of an unfunded plan where any monies paid come out of the general assets of the company, requires forfeiture of plan benefits. To hold such would not be equitable. Only where significant financial loss to the plan is due to fraud, criminal conduct against the plan, or a breach of fiduciary duty to the plan on the part of Plaintiff should benefits be forfeited. This case presents none of those factors. Thus, it is further the opinion of this Court that forfeiture is not appropriate in this case. Defendant's motion for summary judgment is, therefore, due to be denied, and judgment is due to be entered in favor of Plaintiff on Defendants' counterclaim.

An order will be entered in accordance with this opinion.

DONE this 3rd Day of August, 1994.

/s/ R.E. Varner
R. E. Varner
United States District Judge

APPENDIX C

EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT (the "Agreement"), made as of the _____ day of February, 1992 by and between DIVERSIFIED PRODUCTS CORPORATION, a Delaware corporation (the "Company"), and J. MICHAEL MURPHY, an individual resident of the State of Alabama residing at 723 Cary Drive, Auburn, Alabama 36830 (the "Employee");

WHEREAS, the Company desires to employ the Employee in the capacity and on the terms and conditions hereinafter set forth; and

WHEREAS, the Employee wishes to be employed by the Company, on the terms and conditions hereinafter set forth;

NOW, THEREFORE, for these and other valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the Company and the Employee hereby agree as follows:

1. Employment of Employee. On the terms and conditions hereinafter set forth, the Company hereby employs the Employee to serve as the Vice President-Human Resources of the Company or in such other executive capacity as the Board of Directors of the Company may hereafter from time to time determine, and the Employee hereby accepts such employment.

2. Duration of Employment. Employment of the Employee by the Company hereunder shall commence effective as of January 31, 1992 hereof and shall extend until June 30, 1994, unless earlier terminated pursuant to the provisions of paragraph 9 hereof.

3. Duties of Employee. The Employee shall serve the Company and its affiliates well and faithfully and shall at all times use his best efforts to promote the interests thereof, and during the term of his employment hereunder he shall devote his full business time and energies to the Company and its affiliates. The Employee shall comply with all lawful requests and directions given to him by the Board of Directors of the Company (collectively, the "Directors") or the President/Chief Executive Officer of the company (the "CEO") and shall supply the Directors and the CEO with such information and reports as the Directors or the CEO, as the case may be, may from time to time reasonably request.

4. Travel and Related Expenses. The Employee agrees to travel on Company business for reasonable time periods as a part of his duties. The Employee shall be reimbursed for such travel in accordance with the Company's policy in respect thereof. All other out-of-pocket expenses incurred by the Employee in connection with the Employee's duties under this Agreement shall be reimbursed in accordance with the Company's policy in respect thereof.

5. Confidential Information. During the term of employment provided for herein and at all times thereafter, the Employee shall hold and keep confidential all data and information relating to the business of the Company and its affiliates, including, but not limited to, any customer lists, trade secrets or other confidential information, or any discoveries, improvements, practices, processes, methods or products, whether patentable or not, directly or indirectly useful in the business of the Company and its affiliates, and shall not disclose the private affairs of the Company and its affiliates to any person other than to such persons as the Directors or the CEO may direct or for the Company's and its affiliates' purposes,

and shall not use for his own purposes or for any purpose other than those of the Company and its affiliates any information of a confidential nature that relates to the business of the Company and its affiliates which he may now have or hereafter acquire.

6. Inventions and Patents. Employee agrees that all inventions, innovations or improvements in the Company s or its affiliates' method of conducting their respective businesses (including new contributions, improvements, ideas and discoveries, whether patentable or not) (collectively, "Inventions") conceived or made by him during his employment with the Company pursuant to this Agreement or during his prior employment with the Company pursuant to this Agreement or during his prior employment with the Company belong to the company or its affiliates (as the case may be). Employee will promptly disclose such inventions, innovations or improvements to the Directors or the CEO and will perform all actions reasonably requested by the Directors or the CEO to establish and confirm such ownership by the appropriate entity.

7. Compensation of Employee. During the term of his employment hereunder, the Employee shall be paid a minimum annual salary (per fiscal year of the Company) in U.S. dollars in the amount of Seventy-Six Thousand Dollars ($76,000) (the "Base Salary"), which salary shall be paid to the Employee in accordance with the Company's policies and practices as established form time to time. Employee's Base Salary for each fiscal year commencing after June 30, 1992 shall be reviewed at least annually by the Directors and the CEO and may, at their sole discretion, be increased (but not decreased).

8. Benefits and Bonuses. (a) During the term of his employment hereunder, the Employee shall receive at least such benefits from

the Company as are described or provided for in the policies and practices of the company as in effect on the date hereof. During the term of his employment hereunder, the Employee shall be entitled to three (3) weeks of paid vacation with respect to each calendar year.

(b) In addition, the Employee shall be eligible to receive, with respect to each fiscal year of the Company ending during the term of his employment hereunder, an annual bonus (the "Bonus"). The amount of the Bonus payable in each fiscal year shall be based upon the Company's attainment of performance targets to be established by the Directors and/or the CEO. With respect to the fiscal year ending June 30, 1992, the target amount of the Bonus shall equal thirty percent (30%) of the Employee's Base Salary, and the maximum amount of the Bonus shall equal sixty percent (60%) of the Employee's Base Salary. Target amounts and maximum amounts for subsequent fiscal years shall be established from time to time by the Directors and/or the CEO.

(c) The company shall reimburse the Employee for the reasonable cost of buying, financing or leasing one (1) automobile and for reasonable, ordinary maintenance and insurance costs and taxes related thereto for so long as the Employee remains employed hereunder. The selection of the automobile shall be subject to the prior written consent of the CEO. If the Employee currently is in possession of an automobile which the Company has paid for, then the Company's obligations under this paragraph to reimburse the Employee for the cost of buying, financing or leasing an automobile shall be deemed to have been satisfied.

9. Termination of Employment. (a) The Employee's employment under this Agreement shall terminate upon the death or disability of the Employee and may be terminated by the com-

pany at its option at any time, by notice in writing to the Employee, upon the determination by the Directors or the CEO that the Employee should be discharged for any reason or for no reason, with or without Cause. For purposes of this paragraph 9(a), the Employee shall be deemed to have suffered a physical or mental disability if in the opinion of the Directors or the CEO the Employee shall fail because of a mental or physical disability to perform the services required hereunder to the reasonable satisfaction of the Directors or the CEO for a period or four consecutive months or for an aggregate of six months during any twelve-month period. As used in this Agreement, "Cause" shall mean (i) a material breach of this Agreement, including, without limitation, Employee's attempt to voluntarily terminate his employment prior to the expiration of the term set forth in paragraph 2 hereof; provided that the Company shall allow the Employee to cure (if capable of being cured) any material breach (other than voluntary termination) within thirty (30) days after the Company notifies the Employee of such breach, or (ii) a good faith determination by the Directors or the CEO that the Employee has been guilty of fraud, financial dishonesty, a felony, a crime involving moral turpitude, material dereliction of duties, or other wilful misconduct or gross negligence adversely affecting the Company's business, prospects, results of operations, financial condition or public image.

(b) Upon termination of the Employee's employment, neither the Company nor the Employee shall have any further duties or obligations hereunder except (i) the Employee shall continue to be bound in all respects by his obligations concerning confidential information and proprietary rights pursuant to paragraphs 5 and 6 hereof and his obligations pursuant to paragraph 10 hereof; (ii) the Company shall pay the Employee's Base Salary prorated

through the date of termination (all such payments owing to the Employee shall, in the event of termination by death, be paid to the estate of the Employee); and (iii) the company shall pay Employee any additional amounts required under paragraph 9(c) or 9(d) hereof.

(c) In the event the Company terminates the Employee's employment for any reasons other than death, disability or Cause, the Company shall (i) notify the Employee in writing of its election to terminate his employment; and (ii) pay to Employee (as liquidated damages and his sole remedy for such termination) his regular Base Salary payments (expressly excluding any employee benefits or the monetary value of such benefits) until the earlier of (1) June 30, 1994, (2) the date which is two hundred seventy (270) days after the effective date (the "Termination Date") of the termination of Employee's employment hereunder or (3) the date as of which Employee commences employment with a new employer, any Base Salary payments attributable to the Employee's unused vacation time for the then-current calendar year and any bonus earned, but not yet paid, from the Company's prior fiscal year, such payments to be paid in the same manner and according to the same schedule as in effect for employees of the Company generally on the date of such termination; provided, however, that in the event Employee violates any of his obligations under paragraphs 5 (Confidentiality), 6 (Inventions/Patents) or 10 (Non Competition) of this Agreement, the Company's obligations to make any such payments pursuant to this paragraph 9(c) shall immediately terminate.

(d) In the event of any sale, transfer or other disposition of the business of the Company, by way of the sale of all or substantially all of its assets or business, merger, consolidation, the sale or transfer of capital stock in the Company, or otherwise (a "change in Ownership"), the Employee will be entitled to

receive a termination payment equivalent to one hundred fifty percent (150%) of the sum of (i) his then-current Base Salary plus (ii) the amount of his target Bonus for the fiscal year during which the Termination Date occurs (for example, if, for the fiscal year in which the Termination Date occurs, Employee's Base Salary was $76,000 and his target Bonus was $22,800 (i.e., 30% times $76,000), the termination payment under this paragraph 9(d) would be 150% of $98,800, which would be $148,200) if his employment should be terminated, or if he should elect to terminate his employment, within twelve (12) months following the Change in Ownership; provided, however, that no Change of Ownership will occur as the result of (i) an initial public offering of the Company's capital stock registered with the Securities and Exchange Commission or (ii) any transaction involving the Company if, immediately following the consummation of that transaction, more than fifty percent (50%) of the voting common stock of the continuing or successor company is, (or, upon the exercise of then exercisable warrants, would be) owned, directly or indirectly, alone or as a group, by Westinghouse Credit Corporation, The Shansby Group, and/or the affiliates of either such party.

(e) In the event the Employee is terminated for cause, the Company shall have all rights reserved to it against the Employee for the breach of this Agreement.

10. Non-Competition. (a) The Employee agrees that from and after the date hereof and ending on the first anniversary of the termination date of the Employee's employment hereunder, he will not, directly or indirectly, engage in or be concerned with or interested in, advise, lend money to, guarantee the debts or obligations of, or permit his name or any part thereof to be used or employed by, any business (whether as a proprietor, partner, joint ventur-

er, employer, agent, employee, consultant, officer, or beneficial or record owner (other than as a passive investor owning less than a two percent (2%) interest in a publicly-held company)) (i) which is competitive in any respect with any of the fitness or leisure businesses of the company or any of its affiliates in any state in the United States in which the Company or any of its affiliates is then doing business or has made any significant sales to customers (a "Covered State") in the twelve (12) months preceding the Employee's termination, or (ii) which is, directly or indirectly, engaged in any covered State, in the design, development, production, marketing or distribution of the products of the nature designed, developed, produced, marketed or distributed by the Company or its affiliates as of the date the Employee's employment is terminated hereunder. The Employee further agrees that, during the two-year period beginning on the termination date of the Employee's employment hereunder, he will not, directly or indirectly, solicit the employment of any employee of the Company or its affiliates or encourage any employee to leave such employment.

(b) If at the time of enforcement of any provision of Subparagraph 10(a) above, a court holds that the restrictions stated therein are unreasonable under circumstances then existing, the parties hereto agree that the maximum period, scope, or geographical area reasonable under such circumstances will be substituted for the stated period, scope or area.

(c) It is agreed that it would be impossible to fully compensate the company for damages for breach of the obligation of the Employee hereunder. Accordingly, in addition to monetary damages, the Employee and the company specifically agree that the Company and any of its affiliates or successors shall be entitled to temporary and permanent injunctive relief to

enforce such obligations and that such relief may be granted without the necessity of proving actual damages.

11. Governing Law. This Agreement shall be governed by and construed and enforced in accordance with the internal laws of the State of Alabama without regard to choice of law provisions.

12. Entire Agreement: Waiver. This Agreement constitutes the entire agreement between the parties relating to the Employee's employment by the Company and there are no terms relating to the subject matter hereof other than those contained in this Agreement. No variation hereof shall be deemed valid unless in writing and signed by the parties hereto and no discharge of the terms hereof shall be deemed valid unless by full performance by the parties hereto or by a writing signed by the parties hereto. No waiver by either party of any provision or condition of this Agreement to be performed by him or it shall be deemed a waiver of similar or dissimilar provisions or conditions at the time or any prior or subsequent time.

13. Severability. Each provision of this Agreement is intended to be severable from the others so that if any provision or term hereof is determined to be illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remaining provisions and terms hereof.

14. Assignment. This Agreement, and the Employee's rights and obligations hereunder, may not be assigned by the Employee. The Company may assign this Agreement and its rights and obligations hereunder in connection with any sale, transfer or other disposition of the business of the Company by way of the sale of all or substantially all of its assets or business,

merger, consolidation, the sale or transfer of capital stock in the Company, or otherwise.

15. Notices. Any notice or other communication given or rendered hereunder by either party hereto shall be in writing and delivered personally or sent by registered or certified mail, postage prepaid, and if to the Company, addressed to the Company at 309 Williamson Avenue, Opelika, Alabama 36801, Attention: Stephen J. O'Brien, with a copy to Mr. Charles H. Esserman, Diversified Products corporation, c/o The Shansby Group, Suite 1100, 250 Montgomery Street, San Francisco, California 94104; and if to the Employee, addressed to the Employee at his residence address as set forth above.

16. Captions. The paragraph captions are inserted only as a matter of convenience and reference and in no way define, limit, or describe the scope of this Agreement or the intent of any provision hereof.

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto as of the date first above written.

DIVERSIFIED PRODUCTS CORPORATION

By:_____
Its: President and Chief Executive Officer

EMPLOYEE

_____
J. Michael Murphy

APPENDIX D

RETIREMENT AGREEMENT

It is agreed that J. Michael Murphy will retire from Diversified Products with the same rights and privileges granted any existing DP retiree except as follows:

I, J. Michael Murphy, agree to:

1. Retire from DP on December 31, 1992 and make no other claims against DP, its management, or its stockholders, nor they against me, except those identified in this agreement.

2. Not receive nor solicit any award under the existing management bonus plan for the fiscal year beginning July 1992.

3. Not receive nor solicit any award under the existing profit sharing plan for the fiscal year beginning July 1992.

4. Provide up to (30) days consultant services, should it be requested, for a period of one year from the date of this agreement in support of human resource or legal issues at no additional cost to the Company. Services provided beyond (30) days will be compensated at the rate of $75.00 per hour.

5. Murphy agrees to comply with the confidentiality agreement (signed copy attached), for a period of one year from the date of this agreement, and for that period will not, directly or indirectly, engage in, be concerned with, advise, or be employed by any

competitor in the "home" fitness business.

In consideration, Diversified Product Corporation agrees to:

1. Allow J. Michael Murphy to maintain his current position until October 16, 1992.

2. Allow Murphy to remain on the payroll as consultant to the president with all rights and privileges as currently exist until his date of retirement. Reimbursement for automobile expenses and country club dues will continue to December 31, 1992.

3. Continue to pay J. Michael Murphy his current salary for twelve (12) months from the date of his retirement. Payment shall be made in twelve (12) equal payments beginning on the first day of the month following retirement.

4. Murphy shall be defined as DP retiree under Policy No. 2501 (copy attached) and retain group health coverage as outlined in this Policy. Additionally, his current life insurance coverage will continue through December 1993, at his current premium.

This Agreement shall be binding on DP and/or its successors regardless of change in management or ownership unless agreed to by both parties.

/s/ Stephen J. O'Brien
Stephen J. O'Brien
President GEO
DIVERSIFIED PRODUCTS CORPORATION

/s/ Michael Murphy
J. Michael Murphy

_____
Date

_____
Witness

APPENDIX E

IN THE UNITED DISTRICT COURT FOR
MIDDLE DISTRICT OF ALABAMA

J. MICHAEL MURPHY,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	CASE NO.
	*	93-V738-E
	*	
DIVERSIFIED PRODUCTS	*	
CORPORATION, STEPHEN J.	*	
O'BRIEN, individually, and	*	
X, Y, and Z	*	
whose names are unknown,	*	
	*	
Defendants.	*	

MOTION TO REMAND REMOVED ACTION

Comes now, J. Michael Murphy, Plaintiff in the above-styled action, and moves to remand the above entitled cause to the Circuit Court of Alabama, County of Lee, the Court in which this matter was pending at the time the Defendants, Diversified Products Corporation, and Stephen J. O'Brien, caused it to be removed to this Court. In support, therefore, Plaintiff would show unto this Honorable Court as follows:

(1) That, Paragraph 11 of the Defendants' Employment Agreement, which forms the basis of Plaintiff's lawsuit, states as follows: "11 Governing Law. This Agreement shall be governed by and construed and enforced in accordance with the internal laws of the State of Alabama without regard to choice of law provisions."

(2) Plaintiff respectfully contends that the meaning of the foregoing Paragraphs is clear and unambiguous, that the Defendant's are precluded by the language of this paragraph from

arguing preemption, and that no other basis exists upon which the removal of this cause can be predicated. A copy of the foregoing "Employment Agreement" is attached hereto as Exhibit "A", and is incorporated by reference into this motion.

(3) That, the foregoing "Employment Agreement" does not constitute an "Employee Benefit Plan", as contemplated by ERISA, but rather, is in the nature of a Separation Agreement or "golden parachute".

(4) That, Plaintiff's complaint states causes of action based solely on state laws, rights, obligations and duties, and injuries to Plaintiff's rights within the State of Alabama, and are not an ERISA claim.

WHEREFORE THESE PREMISES CONSIDERED, Plaintiff prays the above and titled cause be remanded to the Circuit Court of Alabama, County of Lee, in accordance with requirements of 28 U.S.C. Section 1447(C).

DONE this the 13th day of July, 1993.

/s/ Marrell J. McNeal
Marrell J. McNeal
434 East Magnolia Avenue
Auburn, Alabama 36830
(205) 821-1596

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion to Remand Removed Action upon those persons or parties listed below, by placing copies of the same in the United States Mail, postage prepaid first class and addressed as stated, this the 13th day of July, 1993.

/s/ Marrell J. McNeal
Attorney for Plaintiff

Hon. Jacob Walker
P.O. Drawer 2069
Opelika, Alabama 36803

Hon. Robert T. Meadows, III
P.O. Drawer 2069
Opelika, Alabama 36803

Hon. William A. Clineburg, Jr.
191 Peachtree Street
Atlanta, Georgia 30303-1763

Hon. Leticia D. Alfonso
191 Peachtree Street
Atlanta, Georgia 30303-1763

Supreme Court, U.S.
FILED
OCT 20 1995
OFFICE OF THE CLERK

No. 95-87

In The

Supreme Court of the United States

October Term, 1995

J. MICHAEL MURPHY,

Petitioner,

vs.

DIVERSIFIED PRODUCTS CORPORATION, INC. and STEPHEN J. O'BRIEN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should issue a writ of certiorari to review issues that were neither raised nor ruled upon in the Eleventh Circuit?

II. Whether ERISA preempts a state law misrepresentation claim that relates to a specific benefit of an ERISA plan even though the benefit itself may not constitute a plan under ERISA if administered separately?

III. Whether there is a conflict among the circuits on whether ERISA preempts Petitioner's state law claim that his employer defrauded him into accepting one ERISA plan rather than another?

PARTIES TO PROCEEDINGS BELOW

The Parties to the proceedings below are set forth in the caption of this case.

The following are parent companies and nonwholly owned subsidiaries:

Tube Mill, Inc. (formerly Diversified Products Corp.)

Westinghouse Electric Corp. (as successor by merger to Westinghouse Credit Corp.) - Owner of Tube Mill, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported and is set forth in the Appendix to the petition at pages 1a to 2a. The opinion of the United States District Court for the Middle District of Alabama is unreported and is set forth in the Appendix to the petition at pages 3a to 23a.

STATEMENT OF JURISDICTION

This Court has jurisdiction of the petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of ERISA involved in this case are set forth accurately in the petition at 2.

COUNTERSTATEMENT OF THE CASE

Petitioner originally brought this action against Respondents, his former employer, Diversified Products ("Diversified"), and its President, Steve O'Brien ("O'Brien"), to gain the benefits of a special employee benefit plan that he had been offered while an employee but never accepted. Petitioner alleges that he retired and accepted another employee benefit plan only because O'Brien misrepresented to him that the first plan was invalid and unenforceable.

In January 1992, Diversified's Board of Directors authorized Diversified to enter into Employment Agreements with O'Brien and each of Diversified's four vice-presidents, including Petitioner. Each Employment Agreement included a number of benefit provisions, including Paragraph 9(c), which provided severance benefits in the event Diversified terminated the

employee for "any reasons other than death, disability or Cause," and Paragraph 9(d), which provided a "golden parachute" if an employee was terminated following a sale of Diversified. (*See* App. 29a-30a.)

When Diversified offered the Employment Agreements to each vice-president in February 1992, Petitioner was the only one who did not accept, requesting instead an opportunity to meet with O'Brien to discuss questions he had. Although they did meet several times throughout the year, Petitioner never accepted or signed the Employment Agreement.

O'Brien, who had only been president since September 1991, grew increasingly dissatisfied with Petitioner's performance. In May 1992, Diversified conducted an employee satisfaction poll that ranked Petitioner's department near the bottom in many critical areas. Prior to Petitioner's scheduled performance review in August, O'Brien warned Petitioner by memo that they needed to assess "whether or not you are the best person to lead the [Human Resources] function or whether it's best for you to make a career move now or in the near future." (App. 15a.) Following his evaluation, Petitioner requested by memo that "[i]f my professional relationship with you and DP is to be concluded, then I would expect both of us to also handle such with the highest degree of professionalism, mutual respect and integrity for you and DP, as well as me and my family." (App. 16a.) Shortly thereafter, O'Brien decided to terminate Petitioner.

Although Petitioner was not eligible for Diversified's retirement benefits, Diversified agreed to allow Petitioner to retire, and O'Brien and Petitioner began meeting to negotiate a reasonable retirement package. After Diversified agreed to most of Petitioner's demands, the parties executed the Retirement Agreement, which included provisions for continuing Petitioner's salary for one year and extending group health

benefits and life insurance. Petitioner stopped working in October 1992 and retired effective December 31, 1992. Diversified continues to administer and provide benefits to Petitioner under the Retirement Agreement.

In May 1993, following the announcement of Diversified's sale, Petitioner filed this action in Alabama state court to enforce the Employment Agreement he concedes neither party ever signed. His complaint included four counts of fraud and misrepresentation. Petitioner claims that when he and O'Brien met to negotiate the terms of his Retirement Agreement in September 1992, Petitioner asked about the Employment Agreement and was told the Employment Agreements were not enforceable, Diversified would not honor the Employment Agreements, and Diversified was not contemplating the sale of the company. Petitioner also alleges that had O'Brien not misled him, he would not have retired or accepted the Retirement Agreement. (O'Brien denies having made these statements.)

According to Petitioner he discovered O'Brien's alleged misrepresentations after his retirement, when a former member of Diversified's Board of Directors told him, in March 1993, that the Employment Agreements were enforceable, Diversified intended to honor them, and Diversified had been negotiating a sale of the company while Petitioner was arranging for his retirement. (O'Brien asserts that he first learned about the possibility of a sale in early 1993.) Diversified was sold in June 1993.

When Respondents removed this action to federal court, Petitioner moved to remand. Following a hearing, the district court denied Petitioner's motion, finding that both the Employment Agreement and Retirement Agreement were employee benefit plans and ERISA preempted Petitioner's state law misrepresentation claims because the claims related to the

two plans. (Order, August 6, 1993, p. 5; *see* App. 8a.) After the parties completed discovery, Respondents moved for summary judgment. Following another hearing, the district court granted Respondents' motion, finding that Petitioner was not a participant or beneficiary of the Employment Agreement because he never signed it, he was receiving all his benefits under the Retirement Agreement, and ERISA preempted his state law misrepresentation claims. (App. 13a-14a, 17a.) The district court also found that Petitioner's decision to retire could not have been affected by the alleged misrepresentations because he "would have been terminated had he not retired." (App. 15a-16a.)

On appeal to the Eleventh Circuit, Petitioner did not challenge the district court's findings that the Employment Agreement and Retirement Agreement were employee benefit plans and that Diversified would have terminated Petitioner had he not retired. Instead, he argued that ERISA does not preempt state law claims relating to employee benefit plans in which the employer pays benefits directly and in which only a small number of employees participate. In a brief per curiam decision, the Eleventh Circuit affirmed, finding Petitioner's claims related directly to the Employment and Retirement Agreements and were therefore preempted, and Petitioner was not a participant or beneficiary of the Employment Agreement because he never signed it. (App. 2a.)

REASONS FOR DENYING THE WRIT

Petitioner argued below that the Employment Agreement is not an employee benefit plan and ERISA should not preempt claims relating to certain kinds of employee benefit plans. Petitioner now abandons these arguments and argues for the first time that his claims seeking the benefit of the golden parachute do not relate to an ERISA plan because they only relate to Paragraph 9(d) of the Employment Agreement and ERISA should not preempt claims brought by nonparticipants.

This Court should not grant a writ of certiorari because it has been the practice of this Court not to do so when a petitioner raises arguments for the first time in a petition to this Court. Furthermore, the challenged ruling that ERISA preempts state law claims even though they relate to only one benefit of an employee benefit plan is consistent with this Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and the decisions of other Courts of Appeals. Likewise, there is no conflict among the Courts of Appeals on the principle that ERISA preempts state law claims that relate to an employee benefit plan whether or not the plaintiff is a participant in the plan.

I.

This Court's traditional rule has been to deny certiorari when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotations omitted). Although it is within this Court's power and discretion to hear and decide questions of law that were not raised on appeal or addressed by the lower courts, *see Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995); *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992), it has been the practice of this Court not to grant a petition for a writ of certiorari under such circumstances. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 440-41 (1990) (Marshall, J., dissenting).

This case is a clear example of one in which the court should deny certiorari because a litigant has failed to raise or preserve arguments in the courts below. As the only grounds for his petition, Petitioner raises two arguments that he neither presented in the district court nor raised in the Court of Appeals.

In his complaint, Petitioner alleged that he had been defrauded out of accepting the Employment Agreement. In

opposing removal, Petitioner unsuccessfully argued that the Employment Agreement was not an employee benefit plan covered by ERISA. At the completion of discovery, Respondents moved for summary judgment relying primarily on *Sanson v. General Motors Corp.*, 966 F.2d 618 (11th Cir. 1993), *cert. denied*, 113 S. Ct. 1578 (1993), a decision in which the Eleventh Circuit applied *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), and found preemption on nearly identical facts. In his opposition, Petitioner did not dispute that his claims related to the Employment Agreement or that the Employment Agreement was an ERISA plan. The only arguments Petitioner made were to attempt to distinguish *Sanson* and complain that he would be left without a remedy. The district court granted summary judgment, reiterating its conclusion that Petitioner's "fraud claims relate to an ERISA-governed employee benefit plan and therefore are preempted." (App. 8a.)

On appeal to the Eleventh Circuit, Petitioner again did not challenge the district court's conclusion that his claims related to an ERISA plan. Nor did Petitioner object to the district court's finding that he would have been terminated if he had not retired. Other than raising nonmaterial questions of fact, Petitioner's only argument was that *Sanson* did not or should not apply to an employee benefit plan like the Employment Agreement.

The one page decision of the Eleventh Circuit is a stark testament to Petitioner's failure to raise in that court any of the issues he presses in this petition. The Eleventh Circuit noted at the outset that "the district court concluded, *and the appellant properly concedes*, the Employment Agreement and Retirement Agreement[1] at issue herein are covered by ERISA." (App. 2a.) Based on this concession, the Court of Appeals summarily

1. Petitioner concedes that the Retirement Agreement is an employee benefit plan. Petitioner's brief at 9 n.5.

affirmed, concluding that ERISA preempted Petitioner's claims because they were directly related to two employee benefit plans. (*Id.*)

Petitioner now argues, first, that his claims are not to enforce the Employment Agreement, but to enforce only Paragraph 9(d), which, he argues, is not by itself an employee benefit plan[2]; and, second, that *McClendon* should not bar state law claims brought by nonparticipants of a plan. This Court should deny the petition because neither argument was advocated, considered, or decided below. Nevertheless, as discussed further below, the decisions of the district court and the Eleventh Circuit are also consistent with decisions of this Court and other Courts of Appeals.

II.

Petitioner's new argument that ERISA does not preempt his state law claims because they relate solely to Paragraph 9(d), rather than to the Employment Agreement as a whole, reveals a fundamental misunderstanding of the preemptive scope of ERISA and the decision of this Court in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). In *Fort Halifax*, this Court distinguished between "employee benefits" and "employee benefit plans", and held that Congress intended that ERISA only preempt state laws relating to the latter. *Id.* at 7-8. The case involved a Maine statute that required employers to provide a one-time lump sum severance payment in the event of a plant closing. The Court recognized that Congress designed ERISA's preemption clause to protect employers from additional or conflicting state regulation regarding the administration of a plan. *Id.* at 9. The Court concluded that ERISA did not preempt the statute because it "neither establishes, nor requires an

---

2. The district court disagreed, suggesting that Paragraph 9(d) might also require an administrative scheme. (Order, August 6, 1993, pp. 4-5.)

employer to maintain, an employee benefit plan," and because the "requirement of a one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever." *Id.* at 12.

The Court relied in part on an earlier decision, *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), which is perhaps even more relevant to the facts in this case. In *Shaw*, the Court held that "only disability programs administered *separately from other benefit plans* fall within ERISA's preemption exemption for plans maintained 'for the purpose of complying with . . . disability insurance laws." *Fort Halifax*, 482 U.S. at 10 (*quoting* 29 U.S.C. § 1003(b)(3)) (emphasis added).

The rule that emerges from *Fort Halifax* and *Shaw* is that a court may not "pierce the veil", so to speak, and look within an employee benefit plan to determine whether each provision of the plan requires an administrative scheme. If an employer establishes a "plan", like each of Diversified's five Employment Agreements, ERISA insulates the plan from state regulation. Here, whether Paragraph 9(d) requires administration is irrelevant because, as the district court concluded, the remaining provisions of the Employment Agreement necessarily require an administrative scheme. Petitioner ignores the self-evident fact that every regulation of a benefit is a regulation of the plan of which the benefit is a part. Whether an individual benefit requires administration is irrelevant if the plan requires administration.

Relying on *Fort Halifax*, Courts of Appeals have consistently held that state laws are preempted if they relate to a benefit that is part of a plan. In *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812 (9th Cir. 1992), plaintiff argued that his state law claim to recover benefits under a special "conversion policy" available to participants in his employer's comprehensive employee benefit plan were not preempted

because "the conversion policy and the facts surrounding its processing are merely an employee benefit that is free from ERISA's broad reach." *Id.* at 817. The Ninth Circuit disagreed: "The opportunity to convert the group plan to an individual policy is a benefit provided pursuant to the group plan. . . . No conversion benefits would be available unless the party seeking the conversion policy was an eligible insured beneficiary of a group plan." *Id. See also Boise Cascade Corp. v. Peterson*, 939 F.2d 632 (8th Cir. 1991) (ERISA preempts state law that regulates a term of apprenticeship programs that the state conceded were employee benefit plans), *cert. denied*, 505 U.S. 1213 (1992); *Howard v. Gleason Corp.*, 901 F.2d 1154 (2d Cir. 1990) (ERISA preempts state law claims that employer failed to notify plaintiff of right to convert medical insurance because conversion right was one benefit of welfare benefit plan).

Although Petitioner argues there is a split among the Circuits, in fact each of the four decisions upon which he relies is consistent with *Fort Halifax* and the decisions of the other Courts of Appeals. In *Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254 (8th Cir. 1994), the Eighth Circuit held that ERISA did not preempt a state law claim to enforce a "change-of-control-termination agreement ("CCTA")" or "golden parachute" because "the CCTA was entirely self-contained" and its *only* provision was for the severance payment. *Id.* at 255, 258. In *Sherrod v. GMC*, 33 F.3d 636 (6th Cir. 1994), the Sixth Circuit held that ERISA did not preempt a state law claim to recover under a General Motors plan because the plan's *singular* provision was to pay a lump-sum benefit if an employee voluntarily left GM and relinquished his seniority rights. *Id.* at 638-39. In *Fontenot v. NL Indus.*, 953 F.2d 960 (5th Cir. 1992), the Fifth Circuit held that ERISA did not preempt a state law cause of action to enforce an employer's Senior Executive Severance Plan because the plan's *only* provision was to provide a one-time lump sum severance payment in the event an officer

was terminated within three years of a change of control. *Id.* at 962. Finally, in *James v. Fleet/Norstar Financial Group*, 992 F.2d 463 (2d Cir. 1993), the Second Circuit held that ERISA did not preempt a state law claim to fulfil an employer's promise to give employees who remained through a consolidation a one-time payment of sixty days wages. *Id.* at 463.

In each of these cases, the Court relied on the complete absence of a plan in determining that ERISA did not preempt. Each of these cases stands for the same proposition: although ERISA preempts laws relating to plans and laws relating to benefits that are provided as part of a plan, ERISA does not preempt laws relating to a benefit that is not provided as part of a plan and does not require an administrative scheme.

Petitioner's attempt to avoid preemption by recharacterizing his claim in this Court as one to enforce Paragraph 9(d) alone is fruitless. Paragraph 9(d) is an integral part of the Employment Agreement, which Petitioner concedes is an employee benefit plan; any claim to enforce that provision necessarily relates to an employee benefit plan.

III.

Notwithstanding Petitioner's characterization, the Eleventh Circuit's decision that ERISA preempted his claims was a straightforward application of the rule and reasoning of this Court in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), and of other Courts of Appeals. The exception that Petitioner would have this Court adopt allowing state law claims related to ERISA plans by nonparticipants and nonbeneficiaries would undermine and frustrate Congressional intent that employee benefit plans be insulated against state law regulation.

In *McClendon*, plaintiff alleged that his employer had

terminated him to prevent his benefits from vesting. The Texas Supreme Court held that ERISA did not preempt plaintiff's wrongful termination claim because he sought damages (lost wages and compensation) that were unrelated to the plan. *Id.* at 136. This Court reversed, finding that Congress had expressly preempted common law causes of action when "the existence of a pension plan is a critical factor in establishing liability" and when "there simply is no cause of action if there is no plan." *Id.* at 139-40.

The Court began with § 514(a) of ERISA, which expressly preempts

> any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

Id. at 138 (*quoting* 29 U.S.C. § 1144(a)).

Noting that § 514(a) is "conspicuous for its breadth," and that its "deliberately expansive" language was "designed to 'establish pension plan regulation as exclusively a federal concern,' " the Court summarized its earlier decisions concerning when a law relates to a plan:

> "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Under this "broad common-sense meaning," a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. Pre-emption is also

> not precluded simply because a state law is consistent with ERISA's substantive requirements.

Id. at 138-39 (citations omitted).

The Court had "no difficulty in concluding" that McClendon's cause of action "'relates to' an ERISA-covered plan within the meaning of § 514(a), and is therefore pre-empted." *Id.* at 140. Although McClendon argued that only the plan's existence mattered and not its details, the Court dismissed this argument as "miss[ing] the point, which is that under the Texas court's analysis there simply is no cause of action if there is no plan." *Id.*

Petitioner's cause of action for fraud is no less "related to" an ERISA plan than was McClendon's. Petitioner's own complaint recognizes that to prevail he must prove that an employee benefit plan exists, he was eligible for the plan, he would have received benefits under the plan, and Respondents made a material misrepresentation about the existence and enforceability of the plan.[3]

Petitioner cannot argue that his case is simply a cause of action for fraud, just as McClendon could not argue that his was simply a cause of action for wrongful discharge. In both cases, whether plaintiff will recover necessarily turns on the existence of an employee benefit plan. And, just as the Court's decision in *McClendon* did not eliminate all state law claims for wrongful

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3. In fact, Petitioner's claim for fraud is even more closely related to an ERISA plan than was McClendon's in that to calculate damages, Petitioner will have to reference a second ERISA plan, the Retirement Agreement, as Petitioner's damages would necessarily have to be reduced by the value of benefits he has already received under the Retirement Agreement.

discharge, the decision of the Eleventh Circuit below will not eliminate all state law claims for fraud. The decisions simply preempt causes of action that require, as an element of their case, that plaintiff prove the existence of an ERISA plan.

A number of decisions demonstrate that the Courts of Appeals are interpreting and applying *McClendon* consistently with the decisions below in this case. In *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992), an employee claimed that he accepted a transfer in reliance on his employer's promise to supplement his benefits under a new plan; the Second Circuit held that ERISA preempted his state law claim for misrepresentation. In *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989), plaintiff claimed that he retired and purchased a franchise in reliance on the employer's promise that his retirement benefits as a franchisee would be equivalent to those he would have received had he stayed with the company; the Fifth Circuit held that ERISA preempted plaintiff's state law misrepresentation claims. In *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126 (7th Cir. 1992), plaintiff claimed that he incurred additional personal expenses in reliance on his employer's assurance that he was covered under the employer's medical plan; the Seventh Circuit held that ERISA preempted plaintiff's misrepresentation claim. *See also Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994) (ERISA preempts employee's fraud claim that he retired in reliance on employer's misrepresentation that no new retirement plan was being considered; court did hold that employee was a "participant" of the new plan and therefore had standing to bring a claim under ERISA).

Alternatively, Petitioner argues *McClendon* should not apply when the plaintiff is not a participant in the plan to which the state law cause of action relates. However, nothing in ERISA or the decisions of this Court suggest that ERISA preemption is predicated upon the plaintiff's status as a plan participant.

Rather, ERISA preemption is predicated on a Congressional goal of administrative uniformity. A state law that allows a nonparticipant or non-beneficiary to bring a cause of action that is related to an employee benefit plan is just as likely to disrupt plan administration as is a cause of action by a participant or beneficiary.

Since *McClendon*, this Court has reiterated that the purpose of § 514(a) is

> "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction."

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, 1677 (1995) (*quoting McClendon*, 498 U.S. at 142 (citation omitted)). This passage allows no room for distinguishing between claims brought by participants and claims brought by non-participants. *See also Blue Cross & Blue Shield Plans*, 115 S. Ct. at 1677-78 ("The basic thrust of the pre-emption clause . . . was to avoid a multiplicity of regulations in order to permit the nationally uniform administration of employee benefit plans.")

Petitioner contends that other Circuits have recognized a distinction in preemption cases between participants and nonparticipants, when in fact each decision is distinguishable. In *Harris v. Provident Life & Accident Ins. Co.*, 26 F.3d 930 (9th Cir.

1993), plaintiff sued to recover medical benefits after learning that, contrary to the employer's representation, he was not yet eligible. *Id.* at 931. The Court never applied *McClendon* because it found that subject matter jurisdiction was lacking. Because plaintiff could not bring a claim under ERISA as a participant or beneficiary, and because "'ERISA pre-emption, without more, does not convert a state claim into an action arising under federal law,'" the Court held that the complaint must be remanded for lack of subject matter jurisdiction. *Id.* at 933-34 (*quoting Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64 (1987)).

In *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1401 (1993), plaintiff, an employer, purchased a health insurance policy for himself, his family, and some of his employees. He sued after the insurer refused to reimburse him for medical costs incurred for one of his children. *Id.* at 180-82. The Court held that although the insurance plan was an ERISA plan vis a vis plaintiff's employees, as to plaintiff, the insurance policy was merely an insurance contract between an employer and the insurance company and therefore state law governed. *Id.* at 186.

Finally, in *Weaver v. Employers Underwriters, Inc.*, 13 F.3d 172 (5th Cir. 1994), *cert. denied*, 114 S. Ct. 2137 (1994), the employer obtained a medical insurance policy for his employees. Although the employer referred to plaintiff as an employee and intended that he be covered, plaintiff was legally a subcontractor. When the insurance company learned that plaintiff was a subcontractor and not an employee, it stopped making payments for an injury. After the insurer settled, Plaintiff sued the employer alleging a number of claims arising out of the settlement agreement. *Id.* at 173-74. The Fifth Circuit inexplicably ignored *McClendon* and relied on a test articulated in *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir. 1990), a decision that predated *McClendon*. The court held that plaintiff's

claims were not preempted because the "claims by a nonparticipant and nonbeneficiary to a plan do not affect the relationship between the traditional ERISA entities." *Id.* at 177. This decision is of doubtful validity.

This Court has consistently held that ERISA contains one of the broadest preemption clauses of any piece of federal legislation. Section 514(a) preempts any state law or state law cause of action that could interfere with an employer's administration of an employee benefit plan. Nothing in this Court's decisions or in ERISA itself suggests that an exception should be recognized for plaintiffs who are not participants in the plan. Petitioner cannot argue that such claims would have any less effect on plan administration.

Although Petitioner's claim challenges the scope of ERISA's preemption clause, his real complaint lies with 29 U.S.C. § 1132, ERISA's civil enforcement provision. The answer to Petitioner's appeal is not to create a significant exception to ERISA's preemption clause, but to legislate a new remedy for persons in Petitioner's position. That is a job for the United States Congress.

CONCLUSION

For the foregoing reasons, Respondents urge that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 95-87

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

J. MICHAEL MURPHY,

PETITIONER,

v.

DIVERSIFIED PRODUCTS CORPORATION, INC.
AND STEPHEN J. O'BRIEN,

RESPONDENT.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

Reply to Respondents Brief In Opposition

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Reply to Respondents Brief In Opposition

Respondent begins his brief in opposition by mischaracterizing the arguments made in the petition and by falsely claiming that said arguments are new, and thus waived. The arguments made in the petition, identical to the ones raised in the district court and the Eleventh Circuit, are: first, the employment agreement is not an ERISA plan (petition at 9 and App. 37a-38a); second, even if the employment agreement

is an ERISA plan, Mr. Murphy's claims are not preempted because he was not a participant under the employment agreement and applying 29 U.S.C. 1144(a) would leave an innocent defrauded victim without any remedy, (petition at 11-13 and Appellant's Brief to the Eleventh Circuit at 13, 14) and; finally, that Congress did not intend to preempt these types of claims when doing so would allow a deceitful employer to escape accountability (petition at 13,14 and Appellant's brief to the Eleventh Circuit at 13, 14). Respondent's contention that these argument were not advanced before is contradicted by the citations in the record given above.

However, as to the first issue of whether the employment agreement is an ERISA plan, it is irrelevant whether that issue was raised before because it implicates the subject-matter jurisdiction, or lack thereof, of the district court. The district court's jurisdiction is premised on a conclusion that the employment agreement is an ERISA plan that arises under the statutes of the United States.[1] If this Court follows its own precedent set forth in *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987) and finds that the employment agreement is not an ERISA plan, then it should remand the case to the district court with instructions to remand to the State Circuit Court for lack of subject-matter jurisdiction.

As respondent should know, the issue of subject-matter jurisdiction can NEVER be waived. *See, e.g. Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *California v. LaRue*, 409 U.S. 109, 112, n.3 (1972); *American Fire and Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951); *Mitchell v. Maurer*, 293 U.S. 237,244 (1934); *Jackson v. Ashton*, 8 Pet. 148,149

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[1] *See* 28 U.S.C. § 1331.

(1834). This Court has explicitly held, "the cases are legion holding that a party may not waive a defect in subject-matter jurisdiction or invoke federal jurisdiction simply by consent." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 26 (1989) (Stevens, J., concurring). Respondent's inexplicable request that this Court ignore a possible defect in subject-matter jurisdiction and not consider the *Fort Halifax* issues, in contravention of over one hundred sixty years of precedent, is extraordinary.

After respondent's specious waiver arguments addressed above he began his opposition on the merit by, once again, mischaracterizing the arguments in the petition. Respondent's claim that Mr. Murphy argues that, "his state law claims... relate solely to paragraph 9(d), rather than the employment agreement as a whole"[2] is not found anywhere in the petition. Mr. Murphy, consistent with his position all along,[3] claims that the entire employment agreement is not an ERISA plan under the guidelines of *Fort Halifax*. Since the employment agreement is not an ERISA plan, there can be no preemption, as the district court lacks jurisdiction.

The "golden parachute" provision of the employment agreement is cited by the petition because it happens to be the specific provision Mr. Murphy was defrauded out of by respondent's deplorable conduct. However, the entire employment agreement lacks any ongoing administrative scheme, which is required under *Fort Halifax* before a finding that employee benefits actually become an employee benefit plan under ERISA's umbrella. *See Fort Halifax,* 482 U.S. at 12. All of the benefits in the employment agreement, whether the "golden parachute" in section 9(d)

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[2] *See* Respondent's brief at 7.

[3] *See* Petition at 9.

or the other severance provisions is sections 9(b) or 9(c), simply require a simple computation of an amount of money to be paid to the employee, if the conditions set forth in those sections come to fruition. (App. 24a-33a). Therefore, the entire agreement does not satisfy the *Fort Halifax* requirements.

Respondent properly concedes that, "ERISA does not preempt law relating to a benefit that is not provided as part of a plan that does not require an administrative scheme."[4] Since the employment agreement here, especially section 9(d) which was triggered when DP was sold, provides only for a one-time lump sum payment upon termination and does not contemplate any administrative scheme, it is not an employee benefit plan covered by ERISA. "The requirement of a one-time, lump sum payment triggered by a single event requires no administrative scheme whatsoever ..." *Fort Halifax* at 12.

Respondent fails to cite any authority holding that employment agreements, like the one in this case,[5] constitutes an ERISA plan. This is understandable given the obvious conclusion that writing a check upon termination does not require any ongoing administrative scheme and thus, it cannot be an ERISA plan. Lastly, respondent's failure to distinguish the cases cited in the petition, holding that benefits like the ones in this employment agreement are not ERISA plans demonstrates the futility of any

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[4] Respondents brief at 10.

[5] *See Delaye v. Agripac, Inc.*, 39 F.3d 235 (9th Cir 1994), *Cert. Denied*, ____ U.S. ____, 115 S.Ct. 1402 (1995), where the court held that an employment agreement similar to the one in this case was not an employee benefit plan under ERISA and dismissed the case for lack of subject-matter jurisdiction.

argument which claims that the employment agreement is an ERISA plan.

Mr. Murphy's argument, in lieu of a ruling that the employment agreement is not an employee benefit plan, is that Congress did not intend for preemption to operate when it enures to the detriment of a defrauded victim, leaving him without a remedy under either federal or state law. The petition argues, and the fifth, sixth, and ninth circuits have ruled, that ERISA will not preempt the state law claims of a plaintiff who is not a "participant" or "beneficiary" under ERISA's civil enforcement scheme delineated in 29 U.S.C. 1132.[6] Respondent's attempt to distinguish these cases, cited in the petition for this proposition, is unpersuasive. (Respondent's brief at 15). All of these cases hold, in accordance with the standard established by this court,[7] that preemption will not apply unless the plaintiff is a participant under the specific plan in question.

In response to this argument, respondent cites four cases in which different courts hold that various state claims are preempted. (Respondent's brief at 13). What respondent leaves out, however, is that all of these cases involve the preemption of claims brought by participants of the benefit plans. The plaintiffs in the cases cited by respondent, unlike Mr. Murphy, could have sued their employers under ERISA. Mr. Murphy does not have that luxury because he was fraudulently induced to abandon his rights in the employment agreement in this case in

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[6] These opinions are discussed in the petition at pages 11-15).

[7] *See Ingersell-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

favor of the less attractive retirement agreement.

Specifically, one of the cases cited by respondent held that the plaintiff was a participant in the disputed plan, and the First Circuit gave him standing to pursue an ERISA claim. *Vartanian v. Monsanto Co.*, 14 F.3d 697, 703 (1st Cir 1994). Furthermore, the First Circuit refused to fashion a federal common law remedy on the basis that they had already provided plaintiff with a remedy under ERISA. *Id.* Since Mr. Murphy was defrauded out of signing the employment agreement and lacks standing to bring an ERISA claim, it would be unseemly to deny him any recovery for the contemptible conduct that respondent perpetrated on him.

The basis of the argument that preemption should not apply where the injured party is not a participant springs from this Court's rulings of when preemption will apply. In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 135 (1990), this Court held that preemption will occur if the claim in question is one that Congress intended to be preempted. Allowing participants of a benefit plan to chose a state claim rather than ERISA as a cause of action would clearly frustrate the uniform body of law that Congress tried to create.

However, where the injured party is not a participant and is precluded from maintaining a claim under ERISA, allowing him to proceed with a state claim will in no way affect the uniform body of employee benefit law established by Congress. Conversely, leaving persons like Mr. Murphy without any remedy would contravene the stated goal of ERISA which is to protect employees from employer misconduct. *See* 29 U.S.C. 1001(b).

Finally, respondent's brief fails, in every way, to address the public policy fallout that

would result from the ruling they request. The message to deceitful employers would be unmistakable: as long as you completely defraud an employee out of a plan, he will neither have a federal claim under ERISA nor a state common-law claim. All of the noble policies underlying the passage of ERISA as well as the fundamental tenants of American justice (that one cannot commit a wrong upon another without being accountable) could be subverted by deceitful employers.

Mr. Murphy is not asking this Court to fashion a new federal remedy. He is simply asking this Court to interpret the statute in a way that will both carry out the will of Congress and allow the injured to recover. Mr. Murphy's arguments are compelling and have been accepted and applied by other circuits. Only this Court can now put a stop to this miscarriage and allow Mr. Murphy his day in court. This Court typically grants certiorari in matters involving important federal questions with conflicting authority in the circuits. This case satisfies those requirements.

CONCLUSION

For the foregoing reasons, petitioner urges this Court to grant the Petition for Writ of Certiorari.

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